

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2391

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B P/S

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UNITED STATES OF AMERICA,

Appellee,

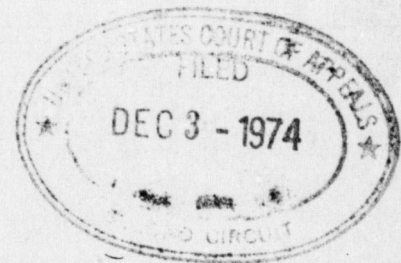
DOCKET NUMBERS 74-2391
74-2441

- against -

PETER A. PEPE and
JOHN E. COUGHLIN,

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT PETER A. PEPE

DAVID BLACKSTONE
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401 BROADWAY
NEW YORK, NEW YORK 10013
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PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York rendered October 23, 1974, convicting appellant Peter A. Pepe and his co-appellant John E. Coughlin, after a trial by jury before the Honorable Marvin E. Frankel of armed bank robbery, Title 18, USC, §§ 2113(a) and (d), bank larceny, Title 18, USC §2113(b), and conspiracy to commit bank robbery, Title 18, USC § 371, and sentencing each appellant to five years. Both appellants were remanded after sentence.

The District Court granted leave to appeal *in forma pauperis*, and this court, on November 11, 1974, continued David Blackstone, Esq., trial counsel below for Peter A. Pepe, as counsel on appeal pursuant to the Criminal Justice Act.

STATEMENT OF THE CASE

INTRODUCTION

Peter A. Pepe and John E. Coughlin were prosecuted for the armed bank robbery of the Empire National Bank in Hyde Park, New York on October 30, 1972. Walter Burton, an unindicted participant in the robbery testified for the government and implicated both defendants as the two other participants in the stick-up. Witnesses at the bank at the time of the robbery were called by the government. They attempted no courtroom identification and essentially described three tall masked gunmen, a description which did not fit the below average height defendants. By proof independent of Burton's testimony, the government established that John Coughlin and a car associated

with Peter Pepe were present at the scene of two motels in Stratford, Connecticut several hours after the robbery, points of rendezvous according to Burton.

The defense, sharply disputing the testimony of Burton, offered flatly contradictory alibi testimony placing both defendants at Peter Pepe's house in New Haven, Connecticut at the time of the bank robbery. Defense evidence was offered that on October 30th Coughlin borrowed Pepe's car in the morning to take Florence Stefane, a woman friend, out for the day. After lunch, Coughlin and Stefane registered at the Stratford Motor Inn but their privacy at the motel was unexpectedly interrupted by Walter Burton who saw them at the parking field and who attempted to borrow their room for a while. Because of this invasion of privacy, Coughlin and Stefane left the Stratford and registered at the nearby Howard Johnson Motor Lodge. This alibi testimony came from Florence Stefane, Mrs. Peter Pepe, and Nancy Iannone. The defense also called Anderson Atkinson, who was an inmate with Burton at the Sommers Jail at the time Burton began "cooperating." Atkinson was told by Burton that he had made a deal with the government and would implicate innocent people in his criminal activities because he was in fear of his actual co-conspirators.

THE GOVERNMENT'S CASE

Mrs. Elaine Blakley was employed as a teller at the Empire National Bank, Hyde Park, New York on October 30, 1972. At about 11:15-11:30 a.m. three men, attired in coats and ski masks, entered the bank. One of the men had a gun and stationed himself

in the lobby area of the bank. [29-30] "Another vaulted the teller's counter and cleared out her cash drawer. [31] The third also went behind the teller's counter. [30]

On direct, Mrs. Blakley, who stood 5'2'', described the perpetrators as being "quite tall, "5'10" maybe 8" or 10"." [29] But on cross examination she admitted originally describing the three men as "two at least 6' and the third 5'10"" to the agents of the Federal Bureau of Investigation.* [55]

Domenick Mazza, another employee of the bank, also described the robbery. [60-63] On direct, Mazza said the men were about "5'6" roughly." Mazza denied on cross examination that he had previously described all the men as 6' to the agents of the Federal Bureau of Investigation at the time he was interviewed on October 30th.** [68]

Bruce Whittaker, a high school teacher, was at a teller's counter cashing his pay check when the masked men entered. His description of the three men, unlike those of Blakley and Mazza, was specific and detailed -

Q Can you describe what the men were wearing other than ski masks?

* In a courtroom demonstration during the course of this cross examination, defense counsel for Pepe, who stands 5'7 3/4", stood back to back with each defendant. Coughlin was shorter than counsel and Pepe was 1" to 1 1/2" taller. (53-54, 571)

** Agent Lowell W. Barton was called by the defense and testified that he interviewed Mazza twice, once on October 30th and again on November 1st. On October 30th Mazza said all three men stood six feet tall. (466) On November 1st Mazza said he was in no position to estimate the height of the two men who went behind the counter and that the man who remained at the lobby was 5'8" or 9". (467-468) (Burton testified that he was the gunman who stood in the lobby. Burton stands at least 5'11".) (135, 171)

A I can recall one had on a dark -- I would say navy blue sort of a pea coat, a heavy coat, one had on I believe a trench coat, a dark colored trench coat, and I can recall a pair of tan pants on one of them.

Q Do you recall -- do you have any recollection of what the gun that you had seen looked like?

A Yes, that's very clear because it was pointed at me.

I feel it was a magnum, some sort of magnum gun because it was larger than the standard gun.

[78-79]

Whittaker, who is 5'11" - 11 1/2" stated that two of the perpetrators were "six feet, thereabouts, 6'1" " and a third was shorter than he about 5'10". [81, 84]

Sussanne Day was walking on the street by the bank at the time of the robbery. [88] She observed three masked men running out of the bank into a green car and race away. [89] All the men, according to Ms. Day were at least 6' tall; but one of the men was shorter than the other two. [93]

Walter Burton was called. On November 16, 1972, Burton and another committed an armed bank robbery of the First National Bank in New Haven, and during their getaway were apprehended after a shoot-out with the state police. [113, 159] He was then prosecuted federally for five armed bank robberies* and prosecuted by Connecticut for attempted murder in connection with the November 16th shoot-out. [113,

* The First New Haven National Bank, New Haven, Connecticut, November 16, 1972; Catskill Bank and Trust, Portland, Maine, October 27, 1972; Bank of Stratford, Stratford, Connecticut, September 29, 1972; Hartford National Bank, Waterford, Connecticut, September 11, 1972; Merchant's National Bank, Manchester, New Hampshire, August 10, 1972.

115, 153] In May of 1973 he began cooperating with the government and divulged his participation in eight other bank robberies.*

[116-118] In return for this cooperation, the government promised not to prosecute him on the robberies he disclosed and promised to make his cooperation known to the Federal and state parole boards when he becomes parole eligible. [115, 225] With this, Burton, who was facing a life term as a multiple felony offender on the state charges,** pleaded guilty and received 16-32 year sentence, and on the federal charges, pleaded guilty and received a concurrent 32 years, making him parole eligible in ten years. [115, 116]

Burton testified that he had known Pepe for ten years and was introduced to Coughlin by Pepe in 1970. [123] The threesome first discussed the Hyde Park robbery and ventured to the area for a casing sometime during the week prior to its commission.*** [125]

* New Britain Bank and Trust Company, New Britain, Connecticut, March 18, 1971; Connecticut National Bank, Walcott, Connecticut, April 23, 1971; Connecticut Bank and Trust Company, West Hartford, Connecticut, May 30, 1972; Community Banking Company, East Haven, Connecticut, June 11, 1972; Guarantee Bank and Trust Company, West Hartford, Connecticut, June 23, 1972; State National Bank, Wallingford, Connecticut, July 14, 1972; Eagle Mutual Benefit Company, Hartford, Connecticut, August 1, 1972; Empire National Bank, Hyde Park, New York, October 30, 1972.

** Burton's prior convictions included: receiving stolen goods, 1958; burglary, 1961; possession of burglary tools and attempted breaking and entering, 1963; burglary, 1963; breaking and entering, 1969; and carrying a concealed weapon, 1971.

*** It was elicited on cross examination that in May 1973 when Burton first discussed the Hyde Park robbery with special agent Stalnaker, he stated that the casing took place three or four days before the robbery. (173) It was shown on cross examination that three days prior, on October 27th, Burton was occupied in a bank robbery in Portland, Maine, and that four days prior, on October 26th he was again in Maine casing the Portland bank. (173-174) Additionally it was shown that on October 25th he was occupied casing another bank in Manchester, New Hampshire, that on the 24th he may have been in jail on a larceny charge in Lindin, Massachusetts, and that on the 23rd he was again in Maine casing the bank. (174, 184, 197)

On route to the area, Coughlin, who first suggested the Hyde Park bank, mentioned that his brother had gone to school in Hyde Park.* [126]

The night before the robbery, the threesome met in the cellar of Pepe's home and laid out various paraphernalia for the robbery - woolen navy caps and cotton gloves for disguise; dent puller with which to steal a car; and a .44 magnum for Pepe, and a .32 automatic for Coughlin, and a .32 revolver for Burton. [129]

On the morning of October 30th Burton in a Volkswagon and Coughlin and Pepe in Coughlin's Cadillac proceeded to Hyde Park. [131] There, they stole a car to be used to get to the bank and make their initial getaway. Then they robbed the bank. [132, 136-139] After a successful getaway, Burton driving his Volkswagon and Coughlin and Pepe in the Cadillac proceeded to the Stratford Motor Inn, Stratford, Connecticut, a predetermined rendezvous point. [140] The two cars followed each other until Poughkeepsie, New York at which point, Coughlin and Pepe proceeded ahead. [139] Burton arrived at the Stratford first and after 10-15 minutes, Pepe and Coughlin arrived in Pepe's Chevrolet. [140]

Coughlin got a room and the three entered. [141] The telephone rang and Burton answered. The party at the other end wanted to know how many people were in the room. Burton replied that there were three but that two were leaving. The party responded

* Burton subsequently admitted that he also was personally familiar with the Hyde Park area. About the time of the robbery he went there to visit the mother of his woman friend, Gwenn Fortman. (147) William O'Halloran, Rector at Eymard Preparatory Seminary in Hyde Park, New York testified for the government that a Robert Francis Coughlin attended school at Eymard Seminary from September, 1960 to June, 1961. (230)

that the room was registered for only one person. [141] After the call, Burton noticed someone taking down the plate numbers of their cars. [142] At this junction, the three men decided to leave and went to the nearby Howard Johnson Motor Lodge where they divided the stolen money. [143]

On cross examination the following questions were put to the witness:

Q While you were in jail and before you were cooperating, it occurred to you that it might be necessary to go to trial, is that right? On some of those cases.

A Yes.

Q And you were planning your defense in some of those cases, is that correct?

A No.

MR. NESLAND: Objection to this line of questioning, your Honor.

THE COURT: I don't know what the line is. I assume it is a very short line, nearly ended.

MR. BLACKSTONE: It is.

Q With respect to the defense that you planned with the Merchant -- as to the charges against you for the Merchant's National Bank in Manchester, New Hampshire, isn't it a fact that you and another prisoner by the name of Roger Lubesky conspired to perpetrate a fraud on the Court and the Judge and the jury in the event of a trial?

MR. NESLAND: Objection.

THE COURT: Sustained.

[199-200]

Thereupon the following colloquy ensued:

MR. BLACKSTONE: Your Honor, I wish to show -- present to the Court, evidence --

THE COURT: Come to the bench.
Secondly, I have already sustained the objection.

(At the side bar.)

MR. BLACKSTONE: I intend to establish that Burton, and he has admitted this in a prior trial, he and Lubesky conspired to raise as a false defense in the Manchester trial that it was Lubesky who committed the bank robbery, and their theme, their plot, was that the defense would be that Lubesky did it. They would subpoena Lubesky, Lubesky would take the stand and then take the Fifth Amendment.*

THE COURT: Objection sustained.
I don't care what Court has admitted it. There is a point of collateralness to which I will not allow this Court to go.

Let's proceed.

[200-201]

Majorie Staley, a registration clerk at the Howard Johnson Motor Lodge, Stratford, Connecticut, testified that on October 30, 1972, a registration card of her employer showed that an individual using the name William Wise registered for a room at 2:41 p.m. [241] Claude Sparks, a fingerprint specialist with the Federal Bureau of Investigation, testified that the fingerprints of John Coughlin were found on that registration card. [253]

Robert Corcoran was on duty at the Stratford Motor Inn on October 30, 1972, when, according to the registration card, a man using the name of John Ford registered for a room at 1:43 p.m. [317, 320] Corcoran recalled the incident and remembered that the man proceeded to the parking field and talked to two or three other people next to two cars. [322] Corcoran then went to the field and

* Testimony of Walter Burton on July 2, 1973, in the United States District Court for the District of New Hampshire at the trial, *United States of America v. William McNellis*, Crim. No. 73-16. (Appendix, Exhibit D)

copied the make and license of those cars on the registration card. [323]* When Corcoran returned to the motel, he called the room of the registrant and asked whether he had a single or double occupancy. The party responded that they were using the room for a meeting in the afternnon and that only one person would stay over. [324] Although Corcoran made no in court identification of the man who registered, he had previously selected Coughlin's photograph from a spread shown to him by special agent Northcutt. [327, 333 et sec.]

THE DEFENSE

Mrs. Rhonda Pepe, testified that she and her husband Peter have been married for 16 years, have four children, and that for the entire period the family lived in New Haven in a two family home acquired by Pepe's parents. [470, 489] Peter Pepe was a baker by trade and managed a pizza establishment until 1970. [482] After that he became a self-employed carpenter. [482] Mrs. Pepe knew John Coughlin and Walter Burton as friends of her husband. [471-472]

On October 30, 1972, she rose early and took her children to school at 8:30 a.m. When she returned, her husband told her that Coughlin called, that his car was stuck and that he needed to borrow the family Chevrolet. [473] Peter Pepe, who was at the time sanding and staining some cabinets in the kitchen, asked his wife to pick up Coughlin, which she did. [473]

Between 10 and 10:30 a.m. Coughlin returned to the Pepe house with Florence Stefane. They all had coffee and then at about

* The make and license of the Volkswagon Burton used in the bank robbery and of the Chevrolet owned by Mrs. Peter Pepe. (342)

11:30 a.m. Coughlin and Stefane left in Pepe's Chevrolet for the afternoon. [473, 481] A little later the Pepe children came home for lunch. Mrs. Pepe became annoyed when Coughlin borrowed the car because she needed it to go shopping for the children's Halloween party the following day. [474] She complained about this to her husband and to her sister, Nancy Iannone, who called Mrs. Pepe around noon and agreed to take her shopping. [474] At 1 p.m. Nancy Iannone arrived and Mrs. Pepe and she went shopping at the King's department store. [476, 477] At 2:30 p.m. when Mrs. Pepe returned, her husband Peter was still inside the house. [478]

Nancy Iannone, the younger sister of Mrs. Pepe, testified that she is married, has two children, and that in 1972 she resided with her family at the Meadowbrook apartments in West Haven, a 15-20 minute drive from the Pepe's. [493] Around lunch time on October 30th, Mrs. Iannone called her sister and learned that Coughlin had borrowed the car leaving Mrs. Pepe without transportation to pick up things for the children's Halloween party. Mrs. Iannone offered transportation and between 12:30 p.m. and 1 p.m. arrived at the Pepe's house. [497] There were no cars in Pepe's driveway when she arrived and after she entered, she saw Peter Pepe just coming out of the shower draped in a big towel. [496] About 20 minutes later, she and Mrs. Pepe went shopping. [498] When she left the house, Peter was still there. [499]

Florence Stefane testified that she is a divorced mother of three with no prior criminal record and was employed as a night bartender at the Ramada Inn in West Haven in 1972. [384-385, 422]

At the time she was already divorced and had custody of her children. [387, 393] Coughlin was a regular patron of the bar and her relationship with him had been casual until one evening in late October, 1972 when she was depressed because October 24th, a day soon approaching, would have marked her thirteenth wedding anniversary. [387] When she mentioned this to Coughlin, he noted that his birthday was also October 24th. [391] Coughlin asked her out for the 24th to celebrate, but the day eventually agreed upon was Sunday, October 29th, a more convenient time because Mrs. Stefane's children would be with their father during the day. [392-393] On the 29th, Stefane and Coughlin went out on their first date and before they parted, agreed to meet again early the following day, Monday, October 30th, as soon as her children went to school. [397, 398]

On October 30th Coughlin called her about 9:30 a.m. and told her he would be delayed because he had to borrow a friend's car. [399] Later that morning Coughlin picked her up in Pepe's car. They drove to Pepe's house and had coffee until about 11:30 a.m. [401] Then Coughlin and Mrs. Stefane left the Pepe's and had lunch in West Haven. [402] After lunch, Coughlin took Mrs. Stefane to the Stratford Motor Inn. [412] After Coughlin registered, Burton whom she also knew from the Ramada Inn, pulled up into the parking field. [413] Burton engaged Coughlin in a brief conversation by the car. [414] There were a few other cars and people in the parking field at the time of this conversation. [414] She and Coughlin then went alone to their room. [414] After they entered, there was a knock on the

door. It was Burton and he wanted to borrow their room for a while. [416] Coughlin said no and closed the door on Burton. [416] Mrs. Stefane became nervous about these developments and asked to leave. [416] They left and registered at the nearby Howard Johnson Motor Lodge. [417]

After their first affair, Coughlin and Stefane became closer and in fact Coughlin moved in with Stefane for a period of time, but they permanently broke up in the spring of 1974. [439]

Walter Burton, according to Stefane, detested Coughlin. On one occasion she heard Burton threaten Coughlin at the Ramada Inn. [417] The dispute was over another woman. [407]

On cross examination, Stefane denied that on the day federal agents came to arrest Coughlin at her house she knew that Coughlin was inside and denied telling the agents that he was not in the house. [442] In rebuttal, the government produced special agent George Phillips of the Federal Bureau of Investigation, who testified that on October 9, 1973, while attempting to execute a warrant for the arrest of Coughlin at Stefane's home, Mrs. Stefane answered the door and denied that Coughlin was in the house. [511] Phillips then conducted a search of the house and found Coughlin crouched behind a partition in a blacked out attic. [517]

Anderson Atkinson testified that he was an inmate at the Sommers Jail where Burton was also incarcerated on bank robbery charges. Atkinson had helped Burton write letters to his family. [363] On one occasion, Burton mentioned to him that he was in on bank

robbery charges, that he had to cooperate with the government, and that he was in the process of "fabricating a story" in which he was implicating innocent people because the people from Massachusetts he was actually involved with were too dangerous. [367, 371] Atkinson did not know either Coughlin or Pepe and had no prior relationship with them, other than a single meeting with them and a court appointed investigator shortly before the trial. [374]

REQUESTS TO CHARGE

After testimony was ended on the morning of September 13th and before summation that afternoon, the court turned to counsels' requests to charge.

The Court declined on its own initiative, the government's request for a flight and concealment instruction:

THE COURT: ... As to your request on flight or other such things, I think you have a similar request in here that I am going to deny, I don't charge about matters of fact as if they were legal things.

You may argue the significance of flight, which is a factual question, but I won't instruct the jury about that. I think you can be guided on that basis.

[547-548]

Defense counsel later requested an alibi charge:

MR. THAU: Your Honor, since you took care of requests, and I must apologize for not having submitted any, the reason I didn't is because I have experienced or enjoyed, I should say, your Honor's charge before.

What I will ask here, and this is not something esoteric which I think much preparation is needed for, is an alibi charge to the effect

that they may find that alibi is sufficient to create a reasonable doubt where it otherwise wouldn't have been.

[558]

The Court responded:

THE COURT: ... As to your request about alibi, seems to me that I can't give it to you both ways. If I grant that, I am going to give the thing about flight and the use of false names.

[559]

Whereupon Mr. Thau responded:

MR. THAU: In that case I withdraw it.*
[559]

And the Court stated:

THE COURT: If you withdraw it, then I let it go at that. I am not sure I would give it to you anyhow, but I was trying to show you the implications of your position from my point of view.

[559]

SUMMATIONS

Each side summed up on the afternoon of September 13th.

Opening to the jury, defense counsel for Pepe stressed the burden of proof on the alibi:

MR. BLACKSTONE: ... Since we are talking primarily about October 30th, 1972, and the whereabouts of Peter Pepe on that date, I will start with the evidence presented by the defense pertaining to Mr. -- pertaining to the whereabouts of Mr. Pepe, because the Government must obtain your unanimous agreement that that evidence of the defense is false, untruthful, beyond a reasonable doubt.

[563]

However, the prosecuting attorney in his summation twice disputed defense counsel's statement of the law:

* Mr. Thau and this counsel privately conferred on this counteroffer and mutually agreed to withdraw the request in order to help avoid the damaging affect of the concealment testimony.

MR. NESLAND: ... I submit to you that the issue in this case is simple. Do you believe the Government's evidence that these two Defendants robbed that bank with Walter Burton or do you believe their witnesses --

MR. THAU: I object.

MR. BLACKSTONE: I object.
That is not the issue. The burden of proof which --

THE COURT: It is argument, but I will tell the jury, and I will mention now, that the burden of proof is on the Government and that the Government must prove its case beyond a reasonable doubt, so that strictly speaking that statement of issue is not correct.

[606]

Again, when approaching his final remarks Mr. Nesland stated:

MR. NESLAND: ... That's the Defendant's evidence, you have to decide what you are going to believe. Which evidence is the truth?

MR. THAU: Your Honor, again I object.
I think we alluded to that earlier. Your Honor had corrected the impression being left by --

THE COURT: It is a permissible form of statement that the jury has to try to figure out which evidence is the truth.

I have told them before, I will tell them again, that the burden of proof is on the Government beyond a reasonable doubt, and I really don't think that form of argumentation requires counsel to keep getting up.

Please go ahead.

MR. NESLAND: As you may remember, Mr. Thau told you that it is your duty to search for the truth.

That is all I am asking you to do. Find the truth of what happened.

[626-627]

THE CHARGE AND OBJECTIONS

The following Monday morning, September 16, 1972, the Court charged the jury.

Regarding the government's burden of proof, the Court charged generally:

THE COURT: ... In response to that indictment, the two Defendants on trial here pled not guilty. That meant from the instant of that plea that the burden was placed on the Government to prove guilt beyond a reasonable doubt before either of these defendants could be convicted.
[632]

After conclusion of the charge, counsel for Coughlin requested an alibi charge once again:

MR. THAU: Your Honor, the Court charged at great length on willfulness and knowingly, and so on, almost presuming that the Defendants had been present at the bank, and that their intentions were in question or ought to be decided by the jury.

Under these circumstances, I would ask the Court to charge additionally that in the event that they have a reasonable doubt that either or both of these Defendants was at Hyde Park at 11:30 in the morning or thereabouts on October 30th, 1972, they should acquit, regardless of anything else in the case.

THE COURT: Denied

[669]

The jury commenced deliberations at 11:35 a.m. [670] At 12:45 p.m. a note was received from the jury. [672] The jury was sent out for lunch and at 2:20 p.m. testimony and supplementary instructions were given. The jury resumed deliberations. [686] At 2:50 p.m. the jury returned guilty verdicts on all counts as to each defendant.

ARGUMENTPOINT I

IN VIEW OF THE FLATLY CONFLICTING TESTIMONY AS TO THE WHEREABOUTS OF THE DEFENDANTS AT THE TIME OF THE OCTOBER 30TH ROBBERY OF THE EMPIRE NATIONAL BANK, THE TRIAL JUDGE SHOULD HAVE GRANTED THE DEFENSE REQUEST FOR AN ALIBI CHARGE, AND THE COURT'S FAILURE TO SO CHARGE CONSTITUTED REVERSIBLE ERROR.

Had the trial court instructed the jury with the law that the government's burden of proof covers the defense of alibi,* an instruction to which a defendant is entitled upon proper request in this Circuit, *United States v. Caci*, 401 F2d 664 (2nd Cir. 1968); *United States v. Tramaglino*, 197 F2d 923 (2nd Cir. 1952), Cert. Denied, 344 U.S. 864 (1952); *Goldsby v. United States* 160 U.S. 70 (1895) the jury may well have acquitted both defendants. For here, the government's case was based upon the testimony of a scandalously corrupt man against the word of three alibi witnesses of no criminal bent, each of whom corroborated the other, in a version of events which placed both defendants in a different state at the time the crime was committed and which explained in a logical way the presence of Coughlin with Pepe's car at two motels in Stratford, Connecticut several hours after the robbery.

Although counsel for appellant emphasized in his summation that the alibi must be proved false beyond reasonable doubt to

* The alibi charge is customarily formulated in one of two ways: Either the court states in substance - if, after consideration of all the evidence in the case you have reasonable doubt as to whether the defendant was present at the time and place the alleged offense was committed, you must acquit him, see Devitt and Blackmar, Federal Jury Practice and Instructions, 2nd Ed. Sec. 11.32, or the court states in substance - whenever a defendant offers evidence of an alibi the burden remains on the government to disprove it beyond a reasonable doubt. See *United States v. Booz*, 451 F2d 719, 723 (3rd Cir. 1971)

sustain a conviction, [563] government counsel when summing up improperly diluted the strength of the alibi by developing the point that the jury need merely decide which side to believe:

MR. NESLAND: ... I submit to you that the issue in this case is simple. Do you believe the Government's evidence that these two defendants robbed that bank with Walter Burton or do you believe their witnesses.

[606]

And again:

MR. NESLAND: ... That's the defendant's evidence. You have to decide who you are going to believe which evidence is the truth.*

[627]

It is unfortunate, therefore, that when the Court charged, it not only omitted alibi but also a stock instruction that the burden on the prosecution to prove guilt beyond reasonable doubt "never shifts to a defendant." See Devitt and Blackmar, Federal Jury Practice and Instructions, 2nd Ed. § 11.01.

The alibi charge states an important legal principal of great benefit to the accused. As noted in *United States v. Marcus*, 166 F2d 497, 503-504 (3rd Cir. 1948)

By the weight of authority it is held that the instructions on the presumption of innocence of the accused, and of the necessity of fastening every necessary element of the crime charged upon he accused beyond a reasonable doubt, are not

* The trial court sustained defense counsels' objections to these comments and told the jury that the people had the burden to prove its case beyond a reasonable doubt. In each instance, however, the court did not specifically focus on the jury's duty to acquit if it had reasonable doubt about the whereabouts of the defendants at the time of the robbery. Also, the court expressed impatience with Mr. Thau when he objected to Mr. Nesland's latter referred to comment and suggested that defense counsel was getting too technical.

enough in cases involving the necessary presence of the accused at a particular time and place, when the accused produces testimony that he was elsewhere at the time. If the accused requests an instruction as to the burden of proof on his alibi, an instruction on the subject must be given so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi, as well as all other phases of the case.

See also *United States v. Barrasso*, 267 F2d 908 (3rd Cir. 1959).

The reason for such special care is that "the jury is likely to become confused about the burden of proof when an appellant offers this type of evidence" and that the jury, unless otherwise informed, will likely "look to that proof for persuasion of its truth." *United States v. Booz*, 451 F2d 719, 722 (3rd Cir. 1971)

Defense counsel's oral request for the alibi charge was originally made on Friday morning, September 13th, well in advance of the Court's charge the following Monday morning, September 16th.* Thus, *United States v. Gonzalez-Carta*, 419 F2d 548 (2nd Cir. 1969) and *United States v. Kahaner*, 317 F2d 459 (2nd Cir. 1963), where oral requests made after the conclusion of the charge were held too late under F.R.Crim.P. §30, are not controlling.** Nor is *United States v. Caci*, *supra*, controlling. In *Caci*, where the alibi evidence was, at best, tenuous and obscure, this court faulted defense counsel for not objecting to the trial court's ruling

* Counsel for Coughlin again requested an alibi charge by way of objection at the side bar after the conclusion of the court's charge. His request was denied. (664)

** Oral requests are sufficient if the court is clearly informed of the point involved. *Hull v. United States*, 324 F2d 817 (5th Cir. 1963)

against an alibi request which had been submitted along with a multitude of other defense requests moments before the charge. In the instant case, defense counsel withdrew their alibi request and did not object, but only after the court "counteroffered" their proper request with a stipulation that it would run the alibi charge with a charge on flight and concealment, a charge initially declined to the government by the Court on its own initiative. Counsel should not have been placed in the position of "trading off" their proper request in order to avoid an unrelated damaging instruction. If counsels' request was proper when made it should have been granted. *Goldsby v. United States, supra.*

Even if, in this court's view, defense counsel did not properly comply with Rule 30, the failure to give such a charge, constituted "plain error," see F.R.Crim.P. § 52(a), in light of the substantiality of the alibi testimony and the government's total reliance upon accomplice's testimony, not corroborated, to prove its case.

POINT II

CROSS EXAMINATION OF BURTON WAS UNDULY RESTRICTED BY THE TRIAL COURT

In 1973 Walter Burton, Aeden McCarthy, and William McNellis were prosecuted for an armed bank robbery of the Merchant's National Bank, Manchester, New Hampshire. Burton and McCarthy pleaded guilty and testified for the government against McNellis.* At McNellis's trial, Burton admitted that he originally concocted a

* The trial ended in jury disagreement and the indictment against McNellis was dismissed on September 13, 1973.

phony defense for himself on that bank robbery with another prisoner by the name of Lubesky. According to the scheme, Burton's defense would be that Lubesky committed the robbery. Lubesky agreed to be summoned as a witness and plead the Fifth Amendment. In the instant trial, defense counsel attempted to elicit this admission from Burton but the Court excluded the testimony on the grounds of "collateralness." [201]

Although Burton in the instant trial admitted a life history of armed violence and larceny, defense counsel did not obtain his admission that he readily would perjure himself or suborn perjury, evidence which would not only diminish Burton's credibility but also bolster the credibility of Anderson Atkinson, the defense witness who testified that Burton told him he was implicating innocent people in his criminal activities. The excluded item was directly probative of Burton's untruthfulness and was not collateral. As noted in *United States v. Masino*, 275 F2d 129, 133 (2nd Cir. 1960):

... Where the principal witnesses appearing in behalf of the prosecution have a criminal record or have engaged in illegal practices and are accomplices to the crime charged, it is essential to a fair trial that the court allow the defendant to cross-examine such witnesses as widely as the rules of evidence permit. *

* The proposed Rules of Evidence sec. 608, 609 (Moore's Federal Practice, Temporary Pamphlet, 1973) will broaden the existing rule that a witness may not be cross examined for acts of misconduct not resulting in a felony conviction, see, e.g., *United States v. Provoo*, 215 F2d 531 (2nd Cir. 1954) to permit examination as to acts of misconduct clearly probative of untruthfulness. In 1973 this court expressed willingness to apply the proposed rule before enactment. *United States v. Allende*, 486 F2d 1351, 1354 (2nd Cir. 1973) See also, *United States v. Varelli*, 407 F2d 735 (7th Cir. 1969), Cert. Denied. 405 U.S. 1040.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE
REVERSED AND THE CAUSE REMANDED FOR A
NEW TRIAL.

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DATED: NEW YORK, NEW YORK
DECEMBER 2, 1974